

NATIONAL MARINE FISHERIES SERVICE POLICY DIRECTIVE 02-110-12
December 15, 2005

Protected Resources Management

Delegation of Authority for Section 7 Consultations Under the ESA

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OPR: F/PR (J. Lecky)

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Certified by: F (W.T. Hogarth, PhD)

SUMMARY OF REVISIONS: This PD establishes a consistent, nation-wide policy. This document supersedes previous PDs 02-110-05 and 02-110-12.

1.0 Introduction. NOAA's National Marine Fisheries Service (NMFS) has reviewed the delegations of authority for conducting consultation pursuant to Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. This delegation supersedes all prior delegations regarding Section 7 of the ESA.

2.0 Objective. To provide for the effective and efficient agency implementation of Section 7 of the ESA by revising the delegation of authority for the conduct of ESA Section 7 consultations to Regional Administrators and to the Director, Office of Protected Resources.

3.0 Authorities and Responsibilities. This directive modifies the Delegations of Authority from the Assistant Administrator for Fisheries in the NOAA Organizational Handbook regarding conduct of Section 7 consultations under the ESA. This directive does not change delegations for other sections of the ESA.

The conduct of formal and informal consultations, the issuance of biological opinions and letters of concurrence and any other responsibilities under Section 7 of the ESA is delegated to Regional Administrators, as set forth in this directive, for actions that may affect ESA-listed species or their designated critical habitat in the geographic area for which the Regional Administrator has primary responsibility, including actions taken by the national offices of NMFS.

The conduct of formal and informal consultations and issuance of biological opinions and letters of concurrence and any other responsibilities under Section 7 of the ESA is delegated to the Director, Office of Protected Resources, as set forth in this directive, for Section 7 consultations not conducted by a Regional Administrator and as follows.

3.1. The Director, Office of Protected Resources, is delegated authority for any consultation on an action determined to have national significance by the Assistant Administrator for Fisheries, in consultation with the Director, Office of Protected Resources, and with appropriate Regional Administrators. Determinations regarding the responsible office for a particular consultation

should be formally documented and disseminated to appropriate Regional Offices and the Director, Office of Protected Resources.

3.2. The Director, Office of Protected Resources, is delegated authority for any consultation on an action where the activities cross regional boundaries and, in consultation with the appropriate Regional Administrators, the action is determined to be national in scope. When an action under consultation crosses regional boundaries but remains regional in scope, the Regional Administrators will, by mutual agreement, determine which Region will have authority to conduct the consultation. Determinations regarding the responsible office for a particular consultation should be formally documented and disseminated to appropriate Regional Offices and the Director, Office of Protected Resources.

3.3 The Director, Office of Protected Resources, is delegated authority for consultations on the issuance of permits and regulations by the Office of Protected Resources, NMFS.

4.0 Process Requirements

4.1. *Quality Assurance Review.* By March 15, 2006, each Regional Administrator and the Director, Office of Protected Resources shall develop and implement a Quality Assurance Plan, consistent with the Improvement Plan for Section 7 Consultations under the ESA, for all consultations undertaken in their Region or in the Office of Protected Resources. The Plan shall establish procedures and protocols for review and clearance of consultation documents and must be consistent with this Directive. The Plan may be modified if directed by the Assistant Administrator for Fisheries or updated as new agency guidelines/standards are implemented. Any instance of deviation from the Plan shall be documented in the records of the Region or the Office of Protected Resources.

4.2. *Legal Review.* Absent a written waiver from the Office of the NOAA General Counsel (NOAA GC), all section 7(a)(2) determinations must receive review and approval for legal sufficiency by the appropriate suboffice of NOAA GC. A determination is legally sufficient if:

1. There is a credible basis to conclude the determination is within the agency's authority and consistent with constraints imposed by statutes or regulations;
2. There is a credible basis to conclude the agency has complied with all applicable procedural requirements; and
3. The agency has articulated a rational explanation for the decision in the letter of concurrence or biological opinion.

For actions delegated to a Regional Administrator, the appropriate suboffice of NOAA GC is the Regional General Counsel. For all other actions, the appropriate office is General Counsel for Fisheries.

The appropriate Regional Counsel, or the Assistant General Counsel for Fisheries, may waive review of individual consultation actions or of categories of consultation actions. Any such waiver must be in writing and based on a finding that all five of the following criteria are met:

1. The action is substantially similar to actions that have previously been the subject of consultations that received NOAA GC review;
2. The consultation does not raise any legal issues that have not been reviewed by NOAA GC in similar consultations;
3. The action is not associated in any way with known existing litigation against NMFS, the action agency, or the applicant;
4. The action and consultation are not controversial such that litigation over the consultation is not reasonably foreseeable nor are there any known congressional interests in the particular action or consultation; and
5. The listed species for which the consultation is conducted have been the subject of recent biological opinions that received previous NOAA GC review.

4.3. *National Section 7 Coordinator.* The Director, Office of Protected Resources, will appoint a National Section 7 Coordinator to serve in an advisory capacity to the Director on Section 7 issues and develop, review, and disseminate information, advice, policy, and guidance on Section 7 issues. The National Section 7 Coordinator shall be responsible for developing and implementing national training programs.

4.4. *Regional Section 7 Coordinator.* Each Regional Administrator will appoint a Regional Section 7 Coordinator to serve in an advisory capacity to the Regional Administrator and other Regional Office leadership on Section 7 issues, and advise Regional staff responsible for conducting Section 7 consultations on policy, procedures, and guidelines on the conduct of Section 7 consultations. The Regional Section 7 Coordinator will work with the National Section 7 Coordinator and the regional suboffice of NOAA GC to help ensure adequate training for Regional staff conducting Section 7 consultations. The Regional Section 7 Coordinator will review highly controversial, precedent-setting, or novel biological opinions and any other consultations the Regional Administrator or Assistant Regional Administrator for Protected Resources deems appropriate to ensure ESA standards and procedures are applied consistently.

4.5. *Tracking and Reporting Consultations.* Each Regional Administrator and the Director, Office of Protected Resources, shall ensure that tracking data and information for consultations conducted by their staff is entered into the Public Consultation Tracking System (PCTS) on a timely basis. The Director, Office of Protected Resources, shall transmit a report from PCTS on the second Friday of each month to the Deputy Assistant Administrator for Regulatory Programs, documenting the number and types of consultation actions (informal, formal, no jeopardy, and jeopardy) completed during the preceding month. The PCTS report will serve as certification that each consultation complies with the process and policy outlined in this delegation memo.

4.6. *Maintaining records.* Each Regional Administrator is responsible for ensuring that a complete record of documents relevant to each consultation decision is maintained.

_____/s/	Dec. 13, 2005
William T. Hogarth, Ph.D.	Date
Assistant Administrator	
for NOAA Fisheries	